No. 2809

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
PLAINTIFF IN ERROR

vs.

WILLARD N. JONES
DEFENDANT IN ERROR

Brief of Defendant in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

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STATUTES.

CASES CITED.

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Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT

This is an action to recover damages for fraud and deceit alleged to have been practiced by the defendant in securing the issuance of patents to certain persons in the complaint mentioned, to certain lands within the limits of the Siletz Indian Reservation. It is averred in substance that the defendant, for the purpose of defrauding the United States, caused certain persons named in the complaint to make homestead entries on lands within said reservation, and later to make final proofs showing residence and cultivation for the period required by law, when in fact it is alleged there had

been no residence or cultivation within the meaning of the law.

Defendant by his answer put in issue the allegations of the complaint and then set forth four separate affirmative defenses, namely:

The first affirmative defense is a plea of good faith on the part of the defendant.

The second affirmative defense is that the cause of action accrued more than six years next prior to the filing of the complaint. In connection with this defense it should be stated that the defendant first demurred to the complaint on the same ground urged in this defense, but the demurrer was overruled, the opinion of the Court thereon being reported in 218 Fed. 973.

The third affirmative defense, after averring that the several tracts of land were subject to entry and were entered as homesteads under the Act of Congress of August 15, 1894, avers that no one of the entrymen in making his final proof represented or testified that he had resided upon the land for a period of three years, and then sets forth the testimony given on the making of the final proof, in which it appears that no one of them claimed to have resided on the land for more than one and one-half years, some of them only claiming to have resided on the land one year. As to all of the entrymen excepting the entryman Wells, proof of military service was made for the purpose of supplying the deficiency of residence and occupation. As to Wells,

his entry was commuted, but the answer sets forth the final proof submitted by him, from which it appears that he only testified to having actually resided on the land ten weeks, whereas the law requires fourteen months' actual residence.

The fourth affirmative defense goes to the measure of damages. It avers that the Entryman Wells paid $240.00 to the Government in commutation of his entry. It is also averred in this defense that the several tracts of land in the complaint described were, prior to the commencement of the action, sold to certain named purchasers who paid full value therefor and took the same in good faith and without any notice of the alleged frauds or deceits.

DEFENDANT'S CONTENTIONS.

Defendant's contentions are:

1. It being conceded that the entrymen, in their final proofs, did not claim to have resided on their respective entries the period required by law, it was immaterial whether the representations they made respecting settlement for a shorter period were true or false. This contention being based on the proposition that a false representation, to be actionable, must be material, and such that, if true, would justify the party to whom it is made in acting on it.

2. The action is barred by the statute of limitations.

3. That for lands patented under the homestead law upon false proofs, the Government cannot re-

cover damages, its sole remedy in such case being a suit to avoid the patent. If, however, the Court should hold that damages may be recovered in such case, the minimum price is the limit of recovery.

BRIEF HISTORY OF THE LEGISLATION MAKING THE LANDS IN QUESTION SUBJECT TO ENTRY.

While it is conceded here, as it was in the Court below, by counsel for the Government, that the Act of Congress under which the entries in question were made does not authorize or permit credit for military service in lieu of residence, a brief history of the legislation may prove helpful.

The entries in question were made under the Act of August 15, 1894 (28 Stat. 286-326). This statute is entitled "An Act making appropriations for current and contingent expenses of the Indian Department, etc., and for other purposes." The Act throws open to settlement the lands of seven separate and distinct Indian tribes and contains various provisions respecting the sale and disposition of these several tracts.

The first lands dealt with are those of the Yankton Indians, and as appears at page 319, the provision respecting those lands is, that:

> "The lands by said agreement ceded * * * shall be subject to disposal only under the homestead and townsite laws of the United

States, * * * *but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged* except as to the sum to be paid as aforesaid."

The next lands dealt with are those of the Yakima Indians, and the provision relative to the disposition thereof is found at page 321 and is as follows:

"And the land so ceded and relinquished is hereby restored to the public domain, subject to the land laws of the United States."

The next Indian lands dealt with in said Act are those of the Cœur d'Alene, and the provision relative to the disposition of such lands will be found at page 323 and is as follows:

"* * * The lands will be disposed of under the homestead and townsite laws, preference being given to those persons who were actual *bona fide* settlers at the date of the agreement, February 7, 1894; provided that in no case shall the price per acre fall below the minimum prescribed by law."

The next lands dealt with are the Siletz lands, being those in question. The provision for the disposition of these lands will be found at page 326 and reads as follows:

"Mineral lands shall be disposed of under the laws applicable thereto and the balance of the land so ceded shall be disposed of as further provided by law under the townsite law and under the provisions of the homestead law. Provided, however, that each settler under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of $1.00 per acre, final proof to be made within five years from the date of the entry *and three years' actual residence on the land* shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent."

It may be mentioned in passing that the provision requiring the payment of $1.50 per acre was subsequently repealed.

The next Indian lands dealt with are those of the Nez Perce Indians, and the provision respecting the disposition thereof will be found at page 332 and is as follows:

"* * * The land so ceded * * * shall be opened to settlement by proclamation of the President and shall be subject to disposal only under the homestead, townsite, stone and timber, and mining laws of the United States.

* * * *But the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States shall not be abridged,* except as to the sum to be paid as aforesaid."

The next lands dealt with are those of the Yuma Indians, and the provision for the disposition thereof is found at page 336, as follows:

> "That all lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain and shall be opened to settlement and sale by proclamation of the President of the United States and be subject to disposal under the provisions of the general lands laws."

The next lands dealt with are those of the Uncompaghre Indians, and the provision respecting the disposition thereof will be found at page 337 and is as follows:

> "That the remainder of the lands of said reservation shall * * * be immediately opened to entry under the homestead and mineral laws of the United States. * * * Provided that after three years' actual and continuous residence upon agricultural lands from date of settlement, the settler may, upon full payment of $1.50 per acre, receive patent for the tract entered."

It will be observed that the lands of seven different tribes were by the same Act opened up to settlement or to be otherwise disposed of, and that the terms, conditions and character of settlement in each case was specifically prescribed by law. In two instances it is specifically provided that "the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of the Revised Statutes of the United States, shall not be abridged," while in the provision relative to the disposition of the lands of the Siletz Indian Reservation, being the lands in question, it is specifically provided that "three years' *actual* residence on the land shall be established," etc., no provision whatever being made for allowance for military service. It may be material to here observe that in this Act the term "*actual* residence" is for the first time used in connection with homestead entries in Congressional legislation.

POINTS AND AUTHORITIES

I.

FALSE REPRESENTATIONS, IN ORDER TO BE ACTIONABLE, MUST BE MATERIAL, AND MUST BE SUCH THAT, IF TRUE, PLAINTIFF WAS JUSTIFIED IN ACTING AS IT DID.

Am. & Eng. Enc. of Law, Vol. 14, pp. 42-59;
Bigelow on Fraud, p. 139;

First National Bank of Elkhart v. Osborne, 48 N. E. 256;
Fernaux v. Sydney Webb, 33 Tex. App. 560;
Russell v. Branhan, 8 Blackford, 304;
Saxby v. Southern Land Co., 63 S. E. 423;
Prince v. Overholser, 75 Wis. 646;
Slaughter's Adm. v. Gerson, 13 Wall. 385;
Platt v. Scott, 6 Blackford, 389;
Robins v. Hope, 57 Cal. 496;
Kent's Com., Vol. 2, pp. 484-5 (4th ed.);
Silver v. Frasier, 85 Mass. 382;
Missouri-Lincoln Trust Co. v. Third Natl. B. of St. Louis, 133 S. W. 357;
Hall v. Johnson, 2d N. W. 55;
Marshall v. Hubbard, 117 U. S. 415.

II.

IT IS FOR THE COURT, AND NOT FOR THE JURY, TO INTERPRET LANGUAGE OF A PERFECTLY PLAIN NATURE, UNAFFECTED BY EXTERNAL FACTS.

Bigelow on Fraud, p. 139;
First National Bank of Elkhart v. Osborne, 48 N. E. 256;
Fernaux v. Sydney Webb. 33 Tex. App. 560.

III.

DAMAGES CANNOT BE RECOVERED FOR FALSE REPRESENTATIONS INDUCING ISSUANCE OF PATENT FOR HOMESTEAD

ENTRY. IF IT BE HELD OTHERWISE, WE SUBMIT THAT THE MINIMUM GOVERNMENT PRICE IS THE UTMOST THAT CAN BE RECOVERED.

20 Cyc. 130;
Smith v. Boles, 132 U. S. 125;
United States v. Pitan, 224 Fed. 604;
Dinwiddie v. Stone, 52 S. W. 814;
United States v. Norris, 222 Fed. 14;
Johnson v. Culver, 19 N. E. 129;
McMillan v. Reaume, 100 N. W. 166.

IV.

THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

Am. & Eng. Enc. of Law, Vol. 19, p. 146;
United States v. Winona & St. Peter R. R. Co., 165 U. S. 464;
United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447;
Sharon v. Tucker, 144 U. S. 533;
Davis v. Mills, 194 U. S. 451 (48 L. Ed. 1067);
Louisiana v. Garfield, 211 U. S. 70;
United States v. Exploration Co., 190 Fed. 405;
Dorsey v. Phillips, 1 S. W. 667; 25 Cyc. 1020;
Steel v. Smelting Co., 106 U. S. 447;
Northern Pacific Ry. Co. v. Eli, 197 U. S. 1;
Southern P. R. Co. v. United States, 200 U. S. 342.

ARGUMENT

I.

(a). FALSE REPRESENTATIONS, IN ORDER TO BE ACTIONABLE, MUST HAVE BEEN MATERIAL, THAT IS TO SAY, MUST HAVE BEEN SUCH THAT, IF TRUE, JUSTIFIED THE PLAINTIFF IN ACTING AS IT DID.

(b). THE QUESTION IS NOT WHETHER THE PERSON TO WHOM THE REPRESENTATION WAS MADE DEEMED IT MATERIAL, BUT WHETHER IT WAS IN FACT MATERIAL.

(c). WHEN THE LANGUAGE IS PLAIN AND NOT SUBJECT TO MODIFICATION *ALIUNDE*, IT IS FOR THE COURT TO DETERMINE WHETHER OR NOT THE REPRESENTATION WAS MATERIAL.

We shall argue these three propositions together. That they state the rule supported by the authorities, we are confident.

In Vol. 14, *Am. & Eng. Enc. of Law*, p. 59, it is said:

> "To constitute fraud, the representations must be as to a material fact. With respect to this rule there is no conflict of opinion, except sometimes in its application. A representation in relation to a fact that is not material to a contract, though it may be false, and known to

be false by the person making it, and though it may be acted upon by the other party, is not fraud, either for the purpose of an action of deceit or for the purpose of rescinding a contract."

As we have seen, the statute under which the proofs were taken and the patents issued specifically required, as a condition precedent to the issuance of the patents, that the entrymen should have actually resided on the land three years. Therefore, proof that the entryman in any case had resided on the land one year, or one and one-half years, was immaterial, because, if true, it would not justify or furnish any excuse for issuing a patent. It was, therefore, immaterial whether the representation was true or false.

Suppose the entryman had falsely represented to the Government that he had actually resided on the land one week, and thereupon, and based on such proof, the Government had issued to him a patent, would that have been actionable deceit? We submit that the supposed case in nowise differs from the one under consideration.

Counsel for plaintiff contend, however, that whether or not a representation is material is a question for the jury. We submit that it may or may not be, depending entirely on the nature and circumstances of the case. Clearly, when it is agreed, as here, precisely what the situation and

representations were, it is for the Court to determine the materiality of the representations.

In *Bigelow on Fraud*, page 139, it is said:

> "Again, concerning the elements which go to make up a case of fraud, it is for the Court and not for the jury to determine whether, *e.g.*, an inducement held out by one party to another, which the latter professes to have acted upon, is material or not. * * * Generally speaking, it is also for the Court to interpret language of a perfectly plain nature, unaffected by external facts such as the particular circumstances in which it is used; when so modified it is for the jury to declare its meaning, but when, as we have just said, the language is plain and not subject to modification *aliunde*, the case is for the Court; and this is true in principle whether the language be written or oral. There is no question of the truth of this proposition when applied to written language; and there should be none in regard to oral statement, for no sound distinction can be drawn between the two cases."

As we have stated, the question is not whether the party claiming to have been defrauded deemed the representations material, but whether or not they were in fact material. Thus the rule is stated in *Am. & Eng. Enc. of Law*, Vol. 14, page 62, as follows:

> "It has been said that fraud is material to a contract if the contract would probably not have been made if the fraud had not been practiced. This, however, is not always true. If a representation is not material, a person has no right to act upon it, and if he does, he is not entitled to relief or redress on the ground of fraud. The question is not whether the person to whom the representation was made *deemed it material, but whether it was in fact material.*"

Now the alleged false representations in the case at bar consisted of a showing to the effect that the entrymen had resided on the lands from one to one and one-half years. This showing is entirely in writing, consisting of the final proofs of the entrymen. They are set forth in the answer and are admitted by the reply. Under the statute it was requisite for each entryman to prove that he had actually resided on the land for three years. There is no pretense that any one of the entrymen offered any such proof. Hence it is clearly a case where it was for the Court to rule as a matter of law whether or not the representations were material. If they were not material, it ceased to be important whether they were true or false. It is equally clear that the representations were not material, for had they been true they would have afforded no excuse, justification or reason whatsoever for issuing the patents. They could not therefore operate as an inducement to issue the patents.

It is true that statements will be found in the books and cases to the effect that where a party has effected his purpose through a misrepresentation which was false, he will not be heard to deny its materiality. That is simply an invocation of the doctrine of estoppel, which has no place in the case under consideration.

Regarding this contention on the part of the plaintiff, the Court below, 232 Fed., p. 224, said:

> "The Government seeks to meet this objection to the right of recovery by invoking the doctrine that a party who has effected his purpose through a misrepresentation cannot deny its materiality. Bigelow on Fraud, 497, citing also Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Co., 4 N. D. 219, 59 N.W. 1066, 37 L. R. A. 593, and note. But the law cannot make that material which is absolutely not material, and so appears by the very transaction itself and the law governing the case. The law of estoppel cannot go so far as to make false representations made in one transaction binding in another and a totally distinct transaction."

The whole theory of the action for deceit is that by a false representation the plaintiff was induced to act as he otherwise would not have acted, because the false represenattion was of such a character that, if true, it furnished a reason or motive for his action. If the representation, being true, would

furnish no reason or justification for the action, then the plaintiff had no right to act on it or give any credence to it.

Suppose an entryman should represent to the Government officials that his ancestors had come over in the Mayflower and therefore he was entitled under the law to have a patent issued to him for 160 acres of government land, and the officer, assuming such to be the law, should issue the patent. Will it be contended that on proof of the falsity of the representation the Government would be entitled to recover damages for deceit? Would the Court be bound to submit to the jury the question of the materiality of the representation? Certainly not. The Court would say at once that the representation afforded no reason for the action taken by the Government, even if true, and hence it was wholly immaterial. As stated by Mr. Bigelow, "when the language is plain and not subject to modification *aliunde*" it is for the Court to determine whether or not the representation was material.

Now it is conceded that the entrymen in question were required to actually reside on their land four years. It is conceded that they made proof of from one to one and one-half years' residence only. It is alleged that in point of fact their proofs were false and that they did not reside on the land one or one and one-half years. That is immaterial, because the proof offered was immaterial. The Government was no more justified in issuing the patents on proof of

one or one and one-half years' residence than it would have been justified in issuing the patents on proof of residence for one day. The officials were acting under positive law. It prescribed the terms and conditions on which they could alienate the lands in question. They were not permitted to dispose of such lands on any terms other than those prescribed by the statute. It follows that any representation of a situation or state of facts short of that which the law required before patent should issue could properly constitute no inducement to the officials to issue the patents.

In *First National Bank of Elkhart v. Osborne*, 48 N.E. 256, deceit was predicated on false representation that a school warrant was "O.K." The law limited such warrants to the payment of expenses for school purposes, while the warrant in question showed on its face that it was issued for the purpose of a circulating library for the schools. The Court, in passing on the question as to whether or not the representation was material, said:

> "We are unable to see in the facts before us sufficient grounds for holding him liable in an action for deceit. The appellant purchased the warrant as evidence of indebtedness of the school township, and not of Osborne. The warrant, upon its face, expressly and plainly indicated to the appellant and all others that it was void, and that the school township could not be

held liable for the price or value of the property for which the warrant was given. The representation of Osborne, in his answer to the cashier's letter of inquiry, that the warrants were 'all O.K.,' related to them, not as his individual contracts, but as evidences of indebtedness of the school township; but his statement that as such evidences they were 'all O.K.,' or all correct, or all right, *was a representation upon which the appellant had no right to rely*, it being bound to take notice of the contents of the warrants. It was stated in the special finding that the 'order was invalid when issued, which was then known by this defendant.' The Court did not state upon what fact or facts it based the statement that the order was invalid, but the facts stated in the finding showed the invalidity of the orders; and the trustee's knowledge of their invalidity, with his representation that they were 'all O.K.,' would not render him liable for deceit to a purchaser who bought them with the knowledge of their invalidity shown upon their face."

So in the case at bar, the representations, even though false, were "representations upon which the plaintiff had no right to rely." It was bound to know the law and was bound to know that even though the representations were true the entrymen were not entitled to patents. Such being the facts,

it was for the Court to say that the representations are not actionable.

The case of *Fernaux v. Sydney Webb, et al.*, 33 Tex. App. 560, was one where the false representation consisted in inducing the plaintiff to surrender possession of certain leased lands. Defendants had leased a large ranch from one Morgan and had in turn sub-leased the ranch to the plaintiff. The lease to the plaintiff contained the provision, "subject to sale of the land." That manifestly and clearly meant, subject to sale of the land by the then owner thereof to some person other than the defendants. However, it was charged that the defendants had falsely represented to their lessee, the plaintiff, that they, the defendants, had purchased the land from Morgan, and thereby the plaintiff was induced to surrender possession of the ranch to the defendants. He averred that as a matter of fact the defendants had not purchased the lands from Morgan and that the representations were false. The Court held that it was immaterial whether the representations were false or not, because even if they had been true that fact would not have entitled the defendants to possession of the land, for the clear intent and meaning of the provision in the lease, "subject to sale of the land," was in case the land should be so sold as to place it beyond the control of the defendants. The Court said:

"The meaning of the contract was that ap-

pellants should hold under the sub-lease for the full period unless the owners should make such a sale of the lands as to put them beyond the control of Sydney Webb & Co. * * * and for this reason; that is, that a sale to Sydney Webb & Co. could not operate as a termination of the sub-lease to appellants, we think they, the appellants, mistook their legal rights when they voluntarily surrendered their lease and the lands and had no recourse upon the appellees. In other words, *the representations of appellees, to be actionable, must have been material, and such as had they been true, the appellants would have been justified in acting upon.*"

Now in this case, as in the one last above cited, the Court said as a matter of law that the representations were not material because, even if true, they would not afford any reason or justification for the plaintiff taking the action he did take. So we say here, even though the representations made by the entrymen of residence and cultivation had been absolutely true, it would not have justified or afforded any excuse for the Government to execute and deliver to them patents. Therefore the representations made were immaterial and it is not important whether they were true or false.

Russell et al. v. Branhan et al., 8 Blackford (Ind.) 304, was assumpsit for $1,000.00 on sale of a construction contract for a certain section of a

canal. The defendants requested the Court to instruct the jury "that if the plaintiffs had falsely represented to the defendants, for the purpose of inducing them to make the contract, that they had done work on said section of the canal to the amount of $800.00 or $1,000.00, while the canal was under the charge of the state, for which they had not received payment, and that, on the final completion of the canal, they (the defendants) would get the pay for such work done, and had thereby induced the defendants to purchase said section, when in truth there was nothing due the plaintiffs for work done on said section and they had been paid in full for all work they had done on said section, they had a right to deduct such amount from the sum to be paid to the plaintiffs." The lower Court refused to give the instruction, and the Supreme Court, reviewing that action, said:

> "The second charge asked to be given by the jury was correctly refused. Had it been material to the defendants that the fact as to plaintiffs' claim for work alleged to have been misrepresented was true, the case might be different. But it was of no consequence to defendants whether such fact was true or false. Suppose the state had owed the plaintiffs for work done on the said section of the canal, the defendants could not, under the contract sold to them, have required the canal company to pay the debt. This is shown by the charter of the company.

> If, therefore, the plaintiffs informed the defendants that they would have a claim on the company for such a debt, it was only a misrepresentation of the legal effect of the contract sold, for which misrepresentation the plaintiffs were not responsible. It could not have deceived the defendants, as they must be presumed to have known the law."

Prince v. Overholser, 75 Wis. 646, was an action for fraudulent representations on sale of a land warrant. The defendant represented to the plaintiff that the warrant was good to locate on "homestead or mineral lands." The warrant on its face read, "The holder is entitled to locate 120 acres at any land office of the United States in one body and in conformity to the legal subdivisions of the public lands, subject to sale for either the minimum or low-graduated price." The Court said:

> "Here both parties had the same information and the means of knowledge of the use that could be made of the warrant, and there was no concealment of the statement on the face of the paper which showed on what lands it could be located. If the defendant did not know or understand it, it was his own fault and negligence."

The Court referred in the decision last above mentioned to the case of *Slaughter's Adm. v. Gerson,* 13 Wall. 385. It is there said:

"The doctrine substantially as we have stated it is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the langauge of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself in all such cases of the means of information, either attributable to his indolence of credulity, takes from him all just claim for relief."

In both of these cases the Court held as a matter of law that the representations were not material. We submit this must always be the case where there is no dispute respecting the relations of the parties, the character of the transaction, and what was said or alleged to have been represented. Referring to the last two cases cited, and the doctrine thereof, and applying the same to the case at bar, we are at a loss to understand how it can be reasonably contended that it was not the duty of the Court here to say as a matter of law that the representations under consideration were immaterial. The duty of the Government, and of its representatives, was defined by statute. The representations alleged did not bring the entrymen within the statute, and hence afforded no ground upon which to predicate deceit, because had the alleged representations been

true, the entrymen did not make the showing necessary to the issuance of patents.

Platt v. Scott, 6 Blackford 389 (Ind.), was a case where the plaintiff sued to recover on two promissory notes executed by the defendant to the plaintiff. The defense was that the notes were obtained by fraud. It appeared from the evidence that the notes were given in part consideration of a land warrant issued under an Act of Congress entitled, "An Act creating bounties of land and extra pay to certain Canadian volunteers." There was evidence tending to show that the plaintiff represented to the defendant before the purchase, and as an inducement to it, that the warrant could be located on any land belonging to the United States within the Indiana territory, etc. The representation was in conformity with the Act of Congress of 1816 under which the warrant was issued, but the law had been changed by subsequent Act of Congress, which confined the location of warrants like that in question to lands of the United States within the State of Indiana. The Court said:

> "*It is considered that every person is acquainted with the law,* both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it. In the case before us the defendant must be presumed to have known the laws relating to the location of the warrant in question; and he cannot,

therefore, be permitted to say that he was misled by the representations which the plaintiff made as to what the law was on the subject."

It seems to us that this applies with full force to the case at bar. The representations here complained of can only be construed as representing or saying to the officers of the Government that the party had resided on land one year, or one and one-half years, and had performed certain military service, and hence he was entitled to a patent. The statute required three years' actual residence, and the officers of the Government are presumed to have known the law and to have known that one or one and one-half years' residence, together with the military service, did not entitled the entrymen, or any one of them, to a patent. Hence the representations were wholly immaterial, because, if true, they furnished no ground for the action which the Government took. It will not be contended that the officers of the Government were not presumed to know the law. How can the Court harmonize that presumption with the contention that they were deceived by certain representations respecting the period of settlement, which, if true, would not bring the entrymen within the law?

An important case, and one throwing much light on the question under discussion, is that of *Robins v. Hope*, 57 Cal. 496. At page 495 the Court said:

"The misrepresentation complained of was as to the title of the plaintiffs to the premises which they were induced to convey under the impression that they had no title thereto. And we understand the rule to be, as stated by the learned Judge who sustained a demurrer to this complaint, that 'a person is conclusively presumed to know the state of his own title to real property. This is always the case where the party deals with a stranger, as in the present case.' No misrepresentation made by Hope or his agents, therefore, as to the proceedings in probate concerning plaintiff's title, or as to the state of their title in any respect, could have had the effect of misleading them."

It is well sometimes to go back to first principles, and we therefore call the attention of the Court to the observations of Chancellor Kent in his Commentaries, Vol. 2, pp. 484-5, 4th Ed.:

"The common law affords to everyone reasonable protection against fraud in dealings; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention

to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting in attention to those points where those would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply."

In *Silver v. Frazier*, 85 Mass. 382, there was a count for falsely representing to plaintiff's agent the boundary of land for the purpose of inducing such agent to build a house at a point other than that at which plaintiff had directed such agent to build. It appeared that the principal had staked out the ground on which the building was to be erected and instructed his agent to erect a building in conformity to the lines by the principal so located. The principal then left the country. The defendant told the agent thereafter that the lines located by the principal were wrong and that the boundary lines was different from that indicated by the principal, and thereupon the agent abandoned the lines located by his principal and acted upon the representation made by the defendant. The Court said:

"The other objection to the maintenance of the action is that the alleged loss or injury suffered by the plaintiff is not the direct and imme-

diate result of the defendant's wrongful act. Stripped of its technical language, the declaration charges only that the agent employed by the plaintiff to do a certain piece of work disobeyed the orders of his principal and was induced to do so by the false statements of the defendant. In other words, the plaintiff alleges that the agent violated his duty and thereby did him an injury, and seeks to recover damages therefor by an action against a third person, on the ground that he induced the agent by false statements to go contrary to the orders of his principal. Such an action is, we believe, without precedent. The immediate cause of the injury and loss to the plaintiff is the breach of duty of his agent. This is the proximate cause of damage. The motives or inducements which operated to cause the agent to do an unauthorized act are too remote to furnish a good ground of action to the plaintiff. The difficulty is not that there is want of privity between the parties. No such element is essential to enable the party injured to recover damages occasioned by a tort. It is sufficient in support of an action for deceit to show that the false statement was made with a knowledge that it was to be acted upon by the party injured, and that the act produced the damages, although the representation was made to an intermediate person. In such case the damage is the direct and imme-

diate result of the fraud, but in the case at bar the damage which the plaintiff has sustained is only the remote and consequential result of the alleged false statement of the defendant."

Why does not that recite precisely the situation here? At the utmost, all that can be contended is that the agents of the plaintiff, the Government officials, disobeyed their instructions. The statute instructed them what to do, and under what circumstances to alienate the land. It is contended, however, that, induced by certain alleged false representations on the part of the defendant, which were entirely contrary to the instructions contained in the statute, and did not bring the entrymen within the statute at all, plaintiff's agents were induced to issue the patents. The proximate cause of the plaintiff's loss was the carelessness, indolence or negligence of the agents of the Government, or their misconstruction and misunderstanding of the law. They either assumed, without inquiring, that the land was not within the Siletz Indian Reservation, or they misconstrued the law touching the requirements precedent to the issuance of a patent for lands within that reservation. In any case, the proximate cause of the plaintiff's loss was the disobedience by the Government officials of the plaintiff's instructions, namely, the provisions of the statute.

In *Missouri-Lincoln Trust Co. v. Third National*

Bank of St. Louis, 133 S.W. 357, a railroad company drew its check on a bank in favor of one Parker. On the same day the check, purporting to have been endorsed by Parker, was presented to defendant by a third person, and it issued to the order of Parker a draft on Chicago and delivered the draft to such third person, who forged the name of Parker and obtained the proceeds of the draft. The draft went through several hands and finally was taken up by the drawee, who discovered the forged endorsement and called upon its immediate endorser to collect from the preceding endorser and pay it. The immediate endorser did so and paid the money over to the drawee. The preceding endorser than brought suit to recover from the drawee on the ground that it had been concealed from it that the drawee had paid and taken up the draft. The Court said:

> "Deceit, to be actionable, must be as to some material matter. The claimed deceit in this case is that defendant concealed from the plaintiff the fact, when it exacted repayment of the amount of the Chicago draft from it, that it had already paid the draft and had it in its possession. We are unable to see how this could possibly be concealment of a matter that at all affected the plaintiff. The presumption is that when the forgery was discovered, the draft then being in the hands of the defendant, turned in by the Chicago bank, defendant paid its amount back to the Chicago bank. Defendant was then

entitled to resort to the next responsible party, and that was plaintiff. *Even if the defendant had told the plaintiff that it had itself taken up the Chicago draft, and had paid it and had it in its possession, these facts would have been no defense to plaintiff as against repayment to either the Chicago bank or to respondent.* It was liable by reason of the fact that it was the one who had obtained payment of the Chicago draft on a forged endorsement. It had money to which it was not entitled. The fact that if it had known the defendant bank had done what it was bound to do—that is, paid back to the Chicago bank the money with which it had been credited on account of this draft—could not in any way discharge the plaintiff from its obligation to make good, which it incurred when it endorsed the draft."

Another case to which we call the attention of the Court is *Hall v. Johnson*, decided by the Supreme Court of Michigan and reported in 2d N.W. at page 55. At page 57 the Court, speaking of the character of false representations necessary to be actionable, said:

"False representations, no matter how acted upon, will not be sufficient to set aside an agreement otherwise valid unless they were material. Immaterial representations, either true or false, cannot be made the basis of relief, even though coupled with the assertion that they were relied

upon. They may constitute a moral wrong but not a legal one."

II.

COUNSEL FOR PLAINTIFF URGE, AND AT GREAT LENGTH ARGUE, THESE TWO PROPOSITIONS: (a) A REPRESENTATION IS MATERIAL WHEN, BUT FOR IT, THE CONTRACT WOULD NOT HAVE BEEN MADE, AND (b) ONE WHO EFFECTS HIS PURPOSE THROUGH FRAUDULENT REPRESENTATION CANNOT DENY ITS MATERIALITY.

Such expressions are numerous in the books, but of course do not justify or support the conclusions counsel draw therefrom nor the application made of them. If the application sought to be made by counsel were admitted, every misrepresentation would be material if acted on by the party to whom it was made. It would be immaterial whether it was of a character, if true, to justify the action. It would only be necessary to inquire whether the fraudulent representer effected a purpose he would not have effected but for the misrepresentation. Of course that is not the law. If the misrepresentation manifestly, if true, supplied no reason for the doing of the act sought to be induced, then it is not actionable, even though had it not been made the action sought would not have been taken. In this case, for instance, the statute required three years' *actual*

residence. The entrymen claimed only one or one and one-half years. Hence, if true, the representation suggested no reason for issuing the patents. Thus, in the case of *Bank of Elkhart v. Osborne, supra,* the Court said that the misrepresentation as to the use to which the warrant could be devoted "was a representation upon which appellant had no right to rely, it being bound to take notice of the contents of the warrant." And in *Fernaux v. Webb, supra,* the Court said "the representations of appellees, to be actionable, must have been material, *and such as, had they been true, the appellants would have been justified in acting upon.*"

Counsel, we submit, entirely overlook the fact that when the entrymen offered their final proof it was material for them to prove that they had resider on the land three years. Proof of a shorter residence was wholly immaterial, as it could not entitle them to patents. The question was not, "Is it true that you have resided on the land one year?" It was not material for any purpose whether that was or was not true. The sole question was, "Have you actually resided on the land three years?" and they did not pretend that they had.

It appears to us that counsel are misled by isolated expressions stating a part only of the rule or rules by which the case is to be determined. The primary requirement, for instance, is that a false representation, to be actionable, must be material, that is, must be such as, if true, would justify the

party to whom it is made in acting upon it. If it were wholly irrelevant, and afforded no reason or inducement for the act, then it would be manifestly immaterial. It is only in cases where the misrepresentation clearly was or might have been accepted as sufficient inducement that the Court or jury are at liberty to find that but for it the contract would not have been made or other thing in question done. Also it is only in such cases that the doctrine invoked by plaintiff to the effect that one who accomplishes his purpose through a fraudulent representation, cannot deny its materiality, applies. If the representation were such that it might be an inducement to the other party and it did so operate, it is not for the perpetrator of the fraud to say that the representation was immaterial. This doctrine, however, necessarily applies only to cases where the representation might have operated as an inducement and where the party to whom it was made was at liberty to act on such inducement if he believed the representation to be true. It can have no application to a case such as the one on trial. Here the duty of the official was defined by positive law, and thereunder they were not at liberty to patent the land in the absence of proof of three years' residence. Hence, proof of a shorter residence could not induce issuance of the patent, consequently on its face was not material.

III.

WHEN THE UNITED STATES BECOMES A PARTY TO A SUIT OR ACTION IN THE COURTS, IT IS BOUND BY THE SAME PRINCIPLES THAT GOVERN INDIVIDUALS.

It is urged by counsel for the plaintiff that the United States, being the party plaintiff, should not be bound by the same rules which govern individuals. Such ought not to be, and happily is not, the law. When property rights are in issue between the Government and a private citizen, there is no reason why the Government should not be subject to the same principles of law and justice by which the citizen must be governed.

In *Vol. 29, Am. & Eng. Enc. of Law,* (2d Ed.), page 172, it is said:

> "When it (United States) submits itself to the jurisdiction of a court, it is not entitled to remedies of an exceptional character, and must prove its case by satisfactory evidence in the same manner as any other suitor."

In *United States v. Beebee*, 17 Fed. 40, it is said:

> "It is well settled that when the United States becomes a party to a suit in the courts and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United

States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law and places itself upon an equality with other litigants."

And in the case of *The Siren,* 7 Wall. 159, the Court said:

"The Government by its appearance in Court waives its exceptions and submits to the application of the principles by which justice is administered between private suitors."

IV.

THE WELLS CASE.

The Wells case differs somewhat from the other entries. He submitted a commutation, being authorized to commute by two statutes. After the passage of the free homestead law, Act of May 17, 1900, which repealed that portion of the Act of 1894 which required payment of $1.50 per acre for the lands in question, a second Act was passed, being that of January 26, 1901, extending the right of commutation to these lands upon a payment of the original price of $1.50 per acre. The commutation section of the Revised Statutes, section 2301, was extended to this entry. Said section reads as follows:

"Section 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of Section 2289 from paying the minimum price

for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry upon making proof of settlement and residence and cultivation for such period of fourteen months."

This merely shortened the time within which proof could be made on paying for the lands. It did not define or change the quality of residence required. The entry was made under the Siletz law and not under the general law, therefore we must look to the Siletz law and not to the provisions of chapter 5 of title 32 of the Revised Statutes to determine the grade and character of residence required. The Siletz law requires *actual* residence. The general law permitted constructive residence. What is meant by actual residence? The Standard Dictionary defined "actual" as follows:

> "ACTUAL: 1. real. indeed. or act; carried out or realized in practice; existing in fact as opposed to merely possible, constructive, conceivable or ideal.
>
> "2. *Law.* existing in fact; real, as distinguished from conjectural or imputed by construction. As actual possession; actual notice; actual damages."

The Secretary of the Interior, in defining the words actual residence as used in this statute, in a decision rejecting a three-year proof in the case of *Adams v. Coates*, 38 Land Decisions, 179, said:

> "It is noticed that, while the residence required by the Act above quoted is reduced to three years, its character is particularly prescribed—it must be 'actual.' This term is new to Federal legislation concerning proceedings to acquire title to public lands and it must be presumed that Congress used the term advisedly. The language of the statute being plain and unequivocal, leaving no room for construction, an apt and sensible meaning must be given thereto, it being inadmissible to either import anything into it or eliminate anything therefrom in order to change or modify its plain intent."

Thereupon the Secretary held that Coates had been *on the land actually* for only 26 months, out of the 36 months required, and that the showing was insufficient to entitle him to a patent.

Now Wells, who was required to *actually* reside on the land for 14 months, testified in his final proof that he was only on the land five times, or visited it five times "from one to two weeks" each time. Hence he did not claim more than from five to ten weeks, out of fifty-six weeks required, of actual residence, and, as the Court below held, the showing made did not entitle him to a patent, therefore the representations were not material.

V.

THE MINIMUM GOVERNMENT PRICE, HOWEVER, IS THE UTMOST THAT THE GOVERNMENT CAN RECOVER IN THE WAY OF DAMAGES.

The fourth affirmative defense is that the lands in question were patented erroneously and that prior to the institution of this action they had been conveyed to certain named good-faith purchasers.

Respecting this defense, our contention is that in no event can the Government recover more than the minimum price of the patented lands. This contention is predicated on the *Act of March 2, 1896,* found at page 450, volume 6, Fed. Stat. Ann. Section 3 of said Act is as follows:

> "That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or cer-

tification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

The provision in the foregoing section respecting "the value of the land as hereinbefore specified," refers to the provision contained in the preceding section, which is that the value to be recovered "in no case shall be more than the minimum government price" of the land.

The first section of the Act refers to suits to vacate and annul patents to lands erroneously issued under a railroad or wagon road grant. Section 3, however, very clearly applies to all cases where land has been "erroneously patented," as is evident from the language, which provides for suit being brought "against the patentee, or corporation, company, person or association of persons for whose benefit the patent was issued."

The Circuit Court of Appeals for the Eighth

Circuit, in the case of *United States v. Norris*, 222 Fed. 14, had this statute under consideration. At page 22 the Court said:

> "Whether or not this section applies to a patent for a homestead entry commuted to a cash entry, may admit of some doubt. The Act of which it is a part is entitled, 'An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents and for other purposes.' This is broad enough to include all patents erroneously or fraudulently issued under any Acts of Congress."

The Court then refers to the fact that section 1 of said Act provides that "suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought * * * within six years after the date of the issuance of such patents, and the limitation of section 8, chapter 561, Second Session of the Fifty-first Congress, and amendments thereto, are extended accordingly as to the patents herein referred to." Proceeding, the Court then says:

> "The reference to section 8, c. 561, is to the Act of March 3, 1891 (26 Stat. 1099) (Comp. St. 1913, Sec. 5114). Sections 2 and 3 of the Act of March 2, 1896, above referred to, are within the title of this Act, and are broad enough to include

> a *bona fide* purchaser of lands erroneously or fraudulently patented under any of the Acts of Congress, and would therefore include a fraudulent entry under the homestead law. The Act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the Government, it shall only recover the minimum Government price thereof from the patentee upon the title being confirmed in a good faith purchaser from him."

In *United States v. Pitan*, 224 Fed. 604, the District Court for South Dakota also had this statute under consideration, and at page 610 the Court said:

> "This Act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the Government, it shall only recover the minimum Government price thereof from the patentee, upon the title being confirmed in a good faith purchaser from him, and is broad enough to include all patents erroneously or fraudulently issued under any of the Acts of Congress."

We submit that the statute clearly contemplates that where lands have been patented through fraud or mistake, the limit of the Government's recovery is the minimum price. It was insisted in the Court below that the statute does not apply to cases of fraud. As stated, however, in the two decisions

from which we have last above quoted, the statute is broad enough to include cases of fraud. It is not necessary, however, for the purposes of this case, to determine that question, for very clearly the patents here were issued erroneously, and that without regard to whether or not the representations alleged were false. Indeed, it is conceded by counsel for the Government that either the Government officials erred in their construction of the statute providing for the sale of the Siletz lands, or overlooked the fact that these lands were within that reservation. It would seem that the latter was the error committed, for it will not be disputed that prior to the issuing of the patents in question the Department of the Interior had held that military service could not be accepted in lieu of residence under the statute providing for the sale of these lands. Unquestionably, therefore, the Government officials overlooked the fact that these lands were within that reservation, and hence erroneously patented them. But if that be not the case, then they construed the statute as permitting credit to be given for military service, which concededly was erroneous. In either view the lands were erroneously patented, and if the Government is entitled to recover at all, it can only recover the minimum price.

VI.

THE STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, reads as follows:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The Court below held against the plea of the statute of limitations, but as the case was determined in our favor, we assume the judgment will not be reversed if for any reason appearing in the record it should be affirmed. We therefore present the question.

It is averred in the complaint that the patents issued in the year 1902. This action was instituted in June, 1912. It is not averred, nor is it contended that the Government did not discover the alleged fraud within the six years next preceding the commencement of the action. It follows that the right of the Government to institute a suit to avoid or annul the patents, is barred, and the question is, does that fact destroy not only that remedy, but as well the right of the Government to recover in any form of action for the alleged fraud.

It is frequently said that statutes of limitations operate only to extinguish the remedy; that they do not affect the right, and hence we find it held that where one has two remedies, arising out of a particular transaction, and one is barred by the statute, he is not precluded from pursuing the other. But, as we shall see, this rule is not of universal application. Thus, in the *American & English Enc. of Law.* (2d Ed.), page 146, it is said:

> "It has often been declared by text writers and judicial authority to be an elementary principle that a statute of limitations affects the remedy only, and not the merits. But this is true only in so far as the statute affords an exemption from liability in personal actions. In such cases it operates on the remedy merely, leaving the right unaffected in other respects. But in so far as the statute operates as a positive prescription, as a means whereby title is vested and new rights are created, it not only bars the remedy but destroys the original right as well. In the former class of cases the right remains and may be enforced by some other remedy than the one barred by statute if such other remedy exists, as in the case of mortgages, or it may form the consideration for a new agreement, while in the latter case the right, being destroyed, cannot again exist except through such formality and for such con-

sideration as are required for its creation originally."

Now the right of the Government to institute a suit to annul or vacate the patents in this case existed because of the alleged fraudulent practices of the defendant, if it ever existed. It had that right, if the allegations of the complaint be true, for the term of six years from the date of the issuance of the patents, or if it did not discover the fraud until later, then for the term of six years from the date of the discovery of the fraud. At the expiration of the six years, in either case, the title of the grantees of the Government became absolute. Even if the patents were void in the beginning, at the expiration of the prescribed period, no suit being instituted, all defects in the title were cured and the patents became as completely valid as if no defect had ever existed. That such is the true construction os the statute is made manifest by the decisions of the Supreme Court of the United States. Thus, in *United States v. Wynona & St. Peter Railroad Company,* 165 U. S. 463, the Court, speaking through Mr. Justice Brewer, said:

"In the first place, it has distinctly recognized the fact that when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered, it is fitting that a time should come when no mere errors or irregulari-

ties on the part of the officers of the Land Department *should be open for consideration.* In other words, it has recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, *be conclusive against the Government*, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

"Thus, in the Act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, *what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer* of the title, providing only that the land was public of the United States and open to sale and conveyance through the Land Department. The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these

appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, *the grantor therein, should not be heard to question them.*"

This was the first case in which that Court was called upon to construe the Act of March 3, 1891.

In the subsequent case of *United States v. Chandler-Dunbar Water Power Co.*, 209 U. S. 447, the Court, speaking of this statute, said:

"The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this Act,'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. (Citing authorities.) The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it *or to validate it* when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of

the United States, had that effect. It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the Act were confined to valid patents it would be almost or quite without use. (Citing authorities.) In form the statute only bars suits to annul the patent. But the statute of limitations, with regard to land, at least, which cannot escape from the jurisdiction, *generally are held to affect the right, even if in terms only directed against the remedy.* (Citing authorities.) This statute must be taken to mean that the patent is to be held good, *and is to have the same effect against the United States that it would have had if it had been valid in the first place.*"

The latter case is important in this, that it affirms the doctrine which we have quoted above from the *American & English Enc. of Law*, for it will be noted the Court says:

"In form the statute only bars suits to annul the patent, but the statute of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally *are* held to affect the right. Even if in terms only directed against the remedy, this statute must be taken

to mean that the patent is to be held good, and has therefore the same effect against the United States that it would have had if it had been valid in the first place."

Here is a clear statement to the effect that not the remedy alone is affected, but the rights which the Government had growing out of the transaction are destroyed.

Manifestly the Supreme Court of the United States gives the same effect to this statute that it gives, and is generally given by the Courts, to title by prescription. This is clear, because in support of the statement last quoted the Court cites the case of *Sharon v. Tucker,* 144 U. S. 533. In that case the Court said:

"It is now well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the states this doctrine has become a positive rule by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall of itself constitute a complete title."

The Court also refers to the case of *Davis v.*

Mills, 194 U. S. 451, 48 L. Ed. 1067. With reference to that decision is unquestionably the following statement which I quote from the latter edition, at page 1071, where it is said:

> "Prescription which applies to easement the analogy of the statute of limitations unquestionably vests a title. There is no such thing as a merely possessory easement. A disseisor of a dominant estate may get an easement which already is attached to it, but the easement is attached to the land by title or not at all. Again, as to land, the distinction amounts to nothing, because to deny all remedy direct or indirect, within the state, is practically to deny the right. The lapse of time limited by such statutes not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder."

In *Louisiana v. Garfield,* 211 U. S. 70, the Supreme Court of the United States again made referance to the Act of 1891, and in stating the effect of the construction put upon that statute by that Court in its previous decisions, said:

> "In United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, it was decided that this Act applied to patents, even if void because of a previous reservation of the land, and it was said that 'the statute not merely took away the remedy but validated the patent.' That is to

> say, it not only took away the remedy but it destroyed the right of the Government, and when the right of the Government is destroyed it is the same as if she never had a right, or, in the language of the decision last quoted, it was said: 'That the statute not merely took away the remedy but it validated the patent.'"

If the patent is validated, then it stands exactly as if it had been perfectly valid at the beginning or when issued. Indeed, the language of the Supreme Court in *United States v. Chandler,* above quoted, is:

> "This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place,"

and we have seen that the Court previously said that statutes such as the one under consideration "generally are held to *affect the right* even if in terms only directed against the remedy."

How is it possible to escape the conclusion that the patent, being by this statute validated from the beginning and the right of the Government growing out of the circumstances in which the patent was issued destroyed, the Government is precluded from pursuing any remedy to recover on such right? Suppose, for instance, that instead of enacting the statute of limitations as it did the Government had

passed an Act subsequent to the issuance of the patents in question reciting that notwithstanding the fact that the Government contended that the patents had been issued through fraud and perjury, the patents were validated and should be held and deemed to have been valid at the time they were issued, could it be reasonably contended that thereafter the Government could prosecute an action to recover damages because of the false representations made and the perjury committed to induce the Government to issue the patents? And yet the Supreme Court of the United States has said, as we have shown, in more than one case in construing this statute, that its effect is to "destroy the right" and validate the patent so that it "is to have the same effect against the United States that it would have had if it had been valid in the first instance," and has also said that "the statute not merely took away the remedy, but validated the patent."

So, in *United States v. Exploration Co.*, 190 Fed. 405, Judge Lewis, after a review of the decisions of the Supreme Court above mentioned, said:

> "There was no active fraud involved in any of these cases, though Mr. Justice Brewer considered the statute in question in that aspect. Each of these cases holds that the statute is to be applied not only *against the remedy, but that it affects the rights of the parties, that on the expiration of the time limited the patent be-*

comes conclusive as a transfer of the title, notwithstanding it may have been voidable; indeed, though it may have been void, nevertheless the statute must be taken to mean that the patent becomes validated on the expiration of six years after its date and passes the title to the patentee *as effectively as though it had been valid in the first instance.* Thus the statute is made an inflexible rule of property; *as much so as statutes which pass title through open, notorious, adverse and continuous possession maintained for a fixed period.*"

The rule here announced is well stated and forcibly argued in the Kentucky case of *Dorsey v. Phillips*, 1 S.W. 667, where the Court, at page 669, says:

"The statute of limitations of this state bars not only the legal remedy, but the legal right; also, whenever the legal remedy is destroyed, the legal right is also destroyed. 'The very idea of a legal right is that it is one which may be enforced by law. The legal right and the legal remedy are therefore correlative. The former implies the existence of the latter, and the latter implies the existence of the former,—neither can exist without the other.' It is also well settled that the statute of limitations of this state that bars the right to recover the possession of property, or to subject it to the payment of a debt, also perfects the title in the person of

the claimant. (Citing authorities.) * * * That the conveyance was either actually or constructively fraudulent, as against appellants, there can be no doubt.

"In either case, however, the statute of limitations provides that no action shall be brought to set aside the conveyance, and subject the property to appellant's debt, on account of such fraud, after the lapse of ten years from the time of such conveyance. If this statute means anything, it means that the non-action of ten years on the part of the appellants *validated and perfected* the appellees' right to said land under said conveyance, as against them, and all others similarly concerned in setting the conveyance aside, and who failed to take action within the ten years; nor does this statute require any adverse holding of the property conveyed, in order to perfect the right of the vendee as against the persons whose rights are affected by the conveyance. It is sufficient if the holding is consistent with the right conveyed, as in this case. The fact that the persons whose rights are affected by the conveyance delay to bring their action within the time fixed by the vendee's title as against them."

At page 1020 of 25 Cyc. it is said:

"Statutes Extinguishing Right of Action—*a.* In General. When the statute of limitations

> of a particular state or country not only bars the right of action but extinguishes the claim or title itself *ipso facto* and declares it a nullity after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held to be an extinguishment of the debt or claim, wherever an attempt may be made to enforce it."

Hence statutes which not only bar the remedy but extinguish the right preclude a recovery in any form of action. It would be entirely illogical to hold that a statute may at once destroy the remedy to recover the land and the right of the Government growing out thereof and yet hold that the Government may prosecute an action to recover damages because of the wrongful taking of the land. To hold that by virtue of the statute the patent is to be deemed and held to be valid from the date of its issue, and yet hold that the Government may show, in an action to recover damages instituted after the statute has run, that the patent was secured through fraud, would be entirely contradictory. It is inconceivable that the right of the Government can be destroyed and the patent declared valid from its date, and yet that the Government may be permitted to prove that the patent was secured through fraud. If the right of the Government is destroyed and the

patents are to be construed and held to have been valid when issued, it follows that the patent carries with it all presumptions which the law attaches to such instruments. It is conclusive not only as to the qualification of the person to whom issued and his title, but it is conclusive upon the question of the performance of the conditions required by the Act of Congress under which the patent was issued. It cannot be held that the patent was valid when issued and that the Government is bound to treat it as valid when issued if it shall also be held that the Government may nevertheless show that it was procured through fraud and perjury. The very declaration that the patent is to be deemed valid from the date of its issuance carries with it the conclusive presumption that every act and thing necessary to secure the patent was done in a lawful manner. Yet if this complaint shall be sustained, it is entirely obvious that in order to enable the Government to prevail it will be necessary for it to attack the validity of the patents in question and to establish the fact that they were fraudulently procured, and that in the very teeth of the presumption which now attaches to them as to the regularity of all proceedings had for their procurement, and in the face of the statute which has operated to make them legal and valid from the beginning. It is, indeed, an attempt on the part of the Government to do indirectly and in this collateral way what it could not do in a direct proceeding.

In the case above cited, *United States v. Chandler-Dunbar Water Power Co.*, the Circuit Court of Appeals, 152 Fed. 25, denied the right of the Government to thus collaterally and indirectly attack a patent which it could not attack directly, the Court saying:

> "Counsel for complainant raises two objections to the application of this statute. One is that this suit is not a suit to annul the Chandler patent, but only to maintain the title to these islands, and that they attack the validity of the patent only for the purpose of maintaining the title to the islands. This amounts to a contention that *although the patent could not be attacked directly, after the time prescribed, yet it may be done indirectly, for the purpose of controlling an incident, the right to which flows from the patent itself. The proposition is too plainly untenable for argument.* But we add that the general rule is that possession of land under a claim of title for the period prescribed by a statute of limitation vests the title in him for whose protection the statute creates the limitation; and if, as we think, possession is not necessary under this statute, the lapse of time is of itself sufficient to effect the same result. The right of action of the United States, assuming it to have had any, was complete at the date of the passage of the act, and the lapse of five

years without action to annul the grant resulted in the confirmation of it."

The patent of the United States when valid stands on an entirely different footing from the deed of an individual. It is an instrument of a higher order and ranks with judgments founded on unimpeachable evidence. Thus, in *Steel v. Smelting Co.*, 106 U. S. 447, an attempt was made in an action at law to attack the validity of a patent of the United States to land on the ground of bribery, perjury and subornation of perjury, but the Court, at page 453, said:

"The validity of a patent of the Government cannot be assailed collaterally because false and perjured testimony may have been used to secure it, any more than a judgment of a court of justice can be assailed collaterally on like ground. If a judgment has been obtained by such means the remedy of the aggrieved party is to apply for a new trial or take an appeal to a higher court. * * * He may also institute some direct proceeding to reach the judgment. Until set aside or enjoined it must, of course, stand against a collateral attack with the efficacy attending judgments founded upon unimpeachable evidence. So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the Government to

> which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way."

If these patents have been validated by operation of the statute in question, as they have been as that statute has been construed again and again by the Supreme Court, then it follows that they stand as unimpeachable as a judgment "founded upon unimpeachable evidence." In no collateral proceeding can any person be heard to say that the evidence upon which the department acted in issuing the patents was false or procured through fraud. To hold that such testimony may be admitted and yet at the same time to hold that the patents are absolutely valid and were valid at the time they were issued is so utterly illogical that we cannot believe that such a rule will be adopted by any court.

In *Northern Pacific Railway Company v. Eli,* 197 U. S. 1, L. Ed. 49, the Supreme Court of the United States again evidenced its adherence to the rule that statutes of limitations as they apply to real property, operate not only to bar the remedy but to extinguish the right. At page 641, L. Ed., the Court, in that case, said:

> "The rule in the State of Washington as to

adverse possession is thus stated by the Supreme Court in this case:

"'One holding land adversely to the rights of another can be devested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations; and this is true, even though he may have originally entered under void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, 5th Ed., page 176:

"'The operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title.'" 25 Wash. 388, 54 L. R. A. 530, 87 Am. St. Rep. 768, 65 Pac. 556.

"In Sharon v. Tucker, 144 U. S. 533, 543, 36 L. Ed. 532, 535, 12 Sup. Ct. Rep. 720, 722, where the statute of limitations in force in the District of Columbia was applied, Mr. Justice Field, speaking for the Court, said:

"'It is now well settled that, by adverse

possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner, should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. Leffingwell v. Warren, 2 Black. 599, 17 L. Ed. 261; Campbell v. Holt, 115 U. S. 620, 623, 29 L. Ed. 483, 485, 6 Sup Ct. Rep. 209.'

"This was quoted in Toltec Ranch Co. v. Cook, 191 U. S. 532, 538, 48 L. Ed. 291, 292, 24 Sup. Ct. Rep. 166, 167, and it was remarked:

" 'Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance.' "

IF THE PATENTS HAVE BEEN VALIDATED, AND THE TITLE TO THE LAND VESTED UNCONDITIONALLY IN THE PATENTEES, HOW CAN THE GOVERNMENT RECOVER THE VALUE OF THE LANDS?

The foregoing decisions clearly support the proposition that the effect of the limitation statute is not simply to bar the right of the Government to recover

the land, but to vest the title to the land in the patentees, and, as stated in *Louisiana v. Garfield, supra,* "it destroyed the right of the Government, *and when the right of the Government is destroyed it is the same as if she never had a right*"; and again, "the statute not merely took away the remedy but *it validated the patent.*"

If the Government's rights in the premises are destroyed as effectually "as if she never had a right" in the matter, how can she now recover the value of the land? Is it not a startling incongruity to say the patent is validated, the rights of the Government, whatever they were, are destroyed, and the title to the land is vested indefeasibly in the patentees, yet the Government can recover the value of the land because the patent was secured through fraud? How can the Government recover the value of the land if it has no interest in it and all its rights relating to it are destroyed by statute?

The Government will doubtless largely rely on the case of *Southern P. R. Co. v. United States,* 200 U. S. 342, 50 L. Ed. 507. That was a case where the Government by mistake conveyed to the S. P. Co. certain lands on the assumption that they had been granted to it by an Act of Congress, when in fact the lands were no part of the grant. The railway company sold the lands thus patented to it by mistake to *bona fide* purchasers, and the Government sought to recover from it the value of the land, not exceeding the minimum Government price, as pro-

vided in the Act of March 2, 1896, ch. 39, 29 Stat. L. 42 (6 Fed. Stat. Ann. 449). It was contended by the Government that the statute constituted a contract between the company and the Government. Mr. Justice Brewer, referring to that contention, said:

> "Passing to the other question, it is charged in the bill that these statutes constituted a valid contract between the Government and the railroad company. Now whether that be strictly true we need not stop to consider. It is enough that upon the facts the Government was entitled to recover from the company. Erroneously and by mistake the officers of the Government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to parties who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective,

> therefore, of the Act of Congress, the Government had the right, when it found that these lands had been erroneously patented to the railroad company, and by it sold to persons who dealt with it in good faith, to sue the railroad company, and recover the value of the lands so wrongfully received and subsequently conveyed."

There can be no doubt of the soundness of that statement as applied to the case there being considered. By mistake, land to which the company had no right whatever, had been conveyed to it, and by it sold to persons who took in good faith and without notice of the defect in the company's title. The company had no right to the land, yet it retained it, sold it and received the money for it, and of course the Government could follow and recover the fund. An action to recover the proceeds of the sale was instituted by the Government within six years from the date of the patent. *At that time neither the remedy nor the right of the Government had been by the limitation statute affected.* But for the fact that the patentee had alienated the land and it was then held by an innocent purchaser, the Government could have had the patent annulled. The situation or period when, by virtue of the statute, a void patent becomes valid and the Government's remedy barred and its rights extinguished had not yet come about. All rights of the Government were yet fully alive.

There is, however, a further distinction between the case last cited and the one at bar. In the former case the grantee had no pretense of right to the land; it was patented to it by mistake and of course the Government was entitled to recover back either the land or its value. In the case of lands granted under the homestead laws, we shall attempt to show under another title that there is no basis on which the Government can recover its value, in any circumstances.

THE LIMITATION STATUTES SHOW THAT THE PURPOSE OF THEIR ENACTMENT WAS TO DESTROY ALL CLAIMS OF THE GOVERNMENT IN CASES SUCH AS THIS, AFTER THE EXPIRATION OF SIX YEARS.

This, we think, is quite apparent. In the first place, we believe that statutes regarding remedies of the Government against a citizen should be viewed in a different light from statutes regulating or prescribing remedies as between private parties. The Government creates and prescribes her own remedies. Such as she cares to exercise she prescribes, and the individual has no vioce in the matter. Hence, when the Government has by public enactment specified the remedy it will invoke for a certain wrong, it is fair to presume that she has adopted that remedy to the exclusion of all others. But when she provides that in a specified case she will avail herself of an additional remedy, it would

seem to establish a conclusive presumption that in all other cases the one remedy only will be pursued.

When we come to investigate the matter of remedies the Government has adopted in cases of this character, we find that since the enactment of the homestead law there never has been, so far as the reported decisions disclose, a single case of this character prior to instituting this suit, but numerous cases have been prosecuted to avoid or annul patents on the ground that they were secured through fraud. Such being the remedy uniformly followed, in 1891 the statute we have quoted was enacted limiting the period within which such suits may be brought. Clearly, this statute was designed, on the expiration of such time, to preclude the Government from asserting any remedy. This is the more manifest when we remember the effect which has always been given such statutes, namely, that they not only bar the remedy but destroy the right. But in 1896 additional legislation was enacted, whereby it was provided that when lands have been erroneously patented to "a railroad or wagon road," a suit to annul the patent might be brought within six years unless the land so patented should have been conveyed to a *bona fide* purchaser, in which case his title was confirmed and suit was directed to be brought against the patentee for the value of the land, not exceeding the minimum price. True, it was stated by the Supreme Court, as we have seen, that such would have been the right of the

Government without the statute, but nevertheless we think the legislation clearly indicates that it was not the intention of Congress that any remedy should be pursued after the expiration of the statute. Apparently it was deemed that the right of the Government for a period of six years to proceed to recover the land or the minimum price thereof was quite sufficient. We submit that a fair construction of this statute is, that either the suit to annul or to recover the minimum price must be commenced within the six-year limitation.

VII.

THERE IS NO METHOD BY WHICH THE DAMAGES SUSTAINED BY THE GOVERNMENT CAN BE MEASURED.

A most persuasive reason why the limitation statute should receive the construction contended for above, is that it is not possible to compute the damages sustained by the government, and hence it has but one remedy, and that is to avoid the patent and recover the land. It will probably be argued that the market value of the lands is the measure of damages, but manifestly that is not true.

In 20 Cyc. 130, the measure of damages in cases of fraud is thus stated:

> "The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of the loss caused by the

fraud of the other party, or, as it has been expressed, plaintiff is entitled to recover damages adequate to the injury which he has sustained. Plaintiff can recover the entire amount of his loss occasioned by the fraud, but the recovery must be limited to the *actual loss* sustained by reason of the fraud."

In *Smith v. Boles,* 132 U. S. 125, the Supreme Court of the United States affirmed this rule.

In *Dinwiddie v. Stone,* 52 S.W. 814, the Supreme Court of Kentucky held that the measure of damages for inducing the purchase of a lot by falsely representing it to be above the established grade of the street is the amount necessary to make it conform to the street grade.

In *Johnson v. Culver,* 19 N.E. 129, the Supreme Court of Indiana held that in an action to recover damages for fraud in inducing one to transfer a large amount of personal property at much less than its value, the measure of recovery is the difference between the amount received and the actual value. The same rule was adopted by the Supreme Court of Michigan in *McMillan v. Reaume,* 100 N.W. 166. Beyond doubt, such is the rule adopted by a very great majority of the courts. Can such rule be observed or followed here? It seems to us not. The principle is compensation for the actual loss. The Government was not selling its land; was not seek-

ing to get the market value thereof by the transaction.

In this case each entryman paid the land office fees; erected a house on his entry, and, if he did not in good faith make it his residence, he credited his term of service as a soldier or sailor on the required period of residence, and although there was no authority of law for so doing, he doubtless thereby forever barred himself from again exercising that right and relieved the Government of its liability to provide him a homestead out of the public domain. In other words, each surrendered to the Government as cancelled and satisfied, his right to that credit. It is apparent that the Government did receive no small consideration for the land. Now it can recover not the value of the land, but the value of what it was to receive but did not receive. This is not a suit to rescind. On the contrary, the Government has elected not to rescind. If there had been no settlement; no payment of fees; no compliance with the terms of the entry, it would be difficult to see how the Government could recover on the basis of the value of the land, because it was not seeking to receive that by the transaction, and hence that value was not its loss. But it is not a case where there was no compliance with or performance of the conditions of the gift. As we have seen, not only were the fees paid, but some improvements were made and at least the term of service of each entryman in the army or navy was credited on the re-

quired term of residence and that right surrendered and cancelled. The Government cannot now say that it will give no credit for these acts of part performance. If it assumes the position of a private litigant and invokes the rules applicable to controversies between private citizens, it must expect to conform to all the essential requirements that would be imposed on an individual. It cannot affirm the grant, sue for the value of the land and refuse to give any credit for the admitted part performance.

Suppose A. should admit an indebtedness to B. for three years' services, and hence say to him, "If you will surrender your claim against me for such services, pay the taxes, reside on and cultivate that certain tract of land for one year, I will deed the land to you," and suppose B. should fraudulently induce A. to believe he had resided on and cultivated the land for the required period and thereby induced A. to convey to him the land, could A. affirm the grant and recover the value of the land? Would he not have to give credit for such performance as had been made? Would he not have to give credit for the value of the three years' services. Certainly he would. So, if it shall be held here that the Government can maintain this action, it follows that credit must be given for the value of the improvements made and the rights surrendered, for the Government has affirmed the grant and seeks to recover the difference between what it received and what it was to receive. It received performance to the extent of

certain admitted improvements, cultivation, payment of fees, and surrender of claims for the period of army and navy services. It will be asserted, and we concede, that it is impracticable to compute the value of such part performance. That simply argues, indeed, as we contend, proves, that such an action as this cannot in any case be sustained. The transaction was not on a money or value basis. It was more in the nature of a gift, and yet it was not purely a gift. Consideration was exacted, and a part thereof, at least, paid. This is not a case where the Government can insist on the forfeiture by the defendant or the patentees of such payment as was made. Had it desired that, it should have rescinded the grant by avoiding the patents. It elected to affirm the grant and sue for damages; hence, it must give credit for the value of the part performance of the conditions. Of course that is impracticable. There is no rule by which the damages can be measured. Hence, this remedy cannot be pursued. It may be contended that no credit can be given for part performance; that the Government is entitled to absolute or at least substantial compliance with all the conditions. That only goes to fortify our position, namely, that the Government has but one remedy, rescission. We say again, no money consideration or thought of money values entered into the transaction on the Government's part. Whether a claim was worth $100.00 or $100,000.00 was immaterial. The same conditions were imposed and the

same consideration exacted in either case. The value of the land was not considered or sought. The object was, not to reap benefit or advantage for the Government, but to advantage and benefit the patentee. It was at once a plan to distribute the public lands to the people and to improve the condition of the homeless by making it possible for them to secure a home. It was thought this could be best accomplished by requiring residence on the lands for a specified period as a condition precedent to the grant. The Government was willing to and it was its policy to give the lands to such citizens as would reside on and cultivate them for the stated period. This policy did not contemplate any pecuniary profit or advantage to the Government. The transaction was in no sense a sale—hence there was no possibility of pecuniary loss to the Government, consequently there can be no pecuniary recovery for failure to conform to the conditions. The Government might, if it so elected, annul the patent, if it discovered that the patentee had not performed the conditions, or it might let it stand and ripen into a perfect grant vesting an indefeasible title. The latter is what it has seen fit to do, and having so done the matter is closed. There can be no recovery of damages for no damages were suffered, no pecuniary benefit having been sought by the transaction, on the part of the Government. It might have revoked the gift, but it saw fit to confirm it.

We respectfully submit that the decision of the Court below should be affirmed.

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